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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. STEVEN HOFF, Defendant and Appellant.	B267620 (Los Angeles County Super. Ct. No. PA072363)

APPEAL from the judgment of the Superior Court of Los Angeles County. Daniel B. Feldstern, Judge. Affirmed in part, reversed in part and remanded with directions.

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant and appellant Steven Hoff of two counts of attempted premeditated murder of a peace officer and one count of possession of a firearm by a felon, and found true multiple firearm use allegations. Defendant was sentenced to a state prison term of 140 years to life, plus 53 years. In challenging the judgment, defendant contends the trial court committed instructional and sentencing errors, and also prejudicially erred in denying pretrial motions pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) and *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), as well as postverdict, presentencing motions pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). Defendant also contends his trial counsel was ineffective.

We reverse the sentence on count 3 (possession of a firearm by a felon) and remand for a new sentencing hearing. We otherwise affirm the judgment of conviction in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2012, defendant was charged by information with two counts of attempted premeditated murder of a peace officer (Pen. Code, § 187, subd. (a), § 664 [counts 1 & 2]), and one count of possession of a firearm with a prior violent conviction (§ 29900, subd. (a)(1) [count 3]). Count 3 was later amended by interlineation to allege possession of a firearm by a felon in violation of section 29800, subdivision (a)(1).

As to counts 1 and 2, the information alleged defendant personally and intentionally used and discharged a firearm in the commission of the offenses and caused great bodily injury to the two victims within the meaning of Penal Code section 12022.53, subdivisions (b), (c) and (d), and section 12022.7, subdivision (a).

As to all counts, it was further alleged defendant had suffered two prior convictions for violent or serious felonies within the meaning of section 667, subdivision (a)(1) and the "Three Strikes" law (§ 667, subds. (b)-(i)). It was further alleged defendant had suffered two prison priors (§ 667.5).

The charges arose from an incident that took place on January 4, 2012, in which defendant, a fugitive parolee, shot at two state parole officers. The case proceeded to a jury trial in July 2015. We summarize only those material portions of the record germane to our discussion.

Defendant had known Lesa Rosen for several years. They had a casual sexual relationship and often drank and used drugs together. In the fall of 2011, defendant was living on and off with Ms. Rosen in a trailer located on a large property in Lakeview Terrace. The property was owned by Jim Pederson and was situated near the 210 Freeway.

Defendant twice told Mr. Pederson that if any police officers came to the property, he would shoot them in the head, drag them off the property and escape onto the freeway. Defendant also showed Mr. Pederson his guns several times and, in early December 2011, he tried to sell him one of the guns.

According to Ms. Rosen, defendant usually carried a firearm as a matter of habit. She did not like the guns lying around in the trailer, but there was a shelf or "cubby" at the head of the bed where he would usually put them when they were in the bed. When defendant left the trailer, the guns "went with him."

On November 9, 2011, Ms. Rosen and defendant were walking to a friend's house when they were stopped by Shane Maloney, a deputy with the Los Angeles County Sheriff's

Department. Deputy Maloney was assigned to the Parole Compliance Team which was tasked with locating individuals who have absconded from parole or probation. Deputy Maloney said he stopped Ms. Rosen and defendant near a known narcotics location.

Ms. Rosen admitted to Deputy Maloney that she had an outstanding warrant which he then verified on his computer. The warrant was related to possession of drug paraphernalia. Defendant identified himself as Jonathan Kyle. Deputy Maloney did not find anyone in the computer with that name. While Deputy Maloney continued to speak with Ms. Rosen, defendant started to walk away "rapidly," looking back over his shoulder several times. Deputy Maloney yelled at defendant to come back, but defendant continued walking down the street and then started to run. During a search of Ms. Rosen incident to her arrest, Deputy Maloney discovered narcotics. Ms. Rosen was arrested, cited and released from jail later that day.

Thereafter, Deputy Maloney had further discussions with Ms. Rosen and with agents in the State Parole Office about defendant's identity. He obtained a photograph of defendant from the state database and immediately recognized him as the individual he had attempted to detain with Ms. Rosen on November 9, 2011. Deputy Maloney learned that defendant's real name was Steven Hoff and he was a fugitive parolee with a no-bail warrant. Defendant's warrant indicated he was armed and possibly dangerous. One of the conditions of defendant's parole was that his residence could be searched day or night, with or without a warrant.

Some time before January 4, 2012, Deputy Maloney contacted Mr. Pederson. Mr. Pederson gave Deputy Maloney

permission to come onto his property to talk and to look for individuals on the property.

On January 4, 2012, Deputy Maloney and his five-member team from the Parole Compliance Team performed a parole search at a property near Mr. Pederson's property in Lakeview Terrace. They were joined by three State Parole officers: Miguel Lopez, Henrik Agasyan, and Michael Wilson. All of the deputies and officers were in uniform that day and the parole agents were wearing black tactical vests. After completing their operation at the nearby property, Officer Lopez asked Deputy Maloney if his team would assist in contacting Ms. Rosen at the Pederson property and attempting to locate defendant.

Deputy Maloney agreed that his team would accompany the State Parole officers to the Pederson property. They arrived around 1:00 p.m. Based on his previous discussions with Mr. Pederson, Deputy Maloney believed he had permission to enter the property.

The trailer where Ms. Rosen lived was small, approximately 6 feet by 10 feet, and located up a slope and toward the back of the property. There was a generator next to the trailer that made a loud noise. Officers Lopez, Agasyan and Wilson walked up to the trailer, while Deputy Maloney and his team stayed back watching possible escape routes. Officer Agasyan turned off the generator. Both he and Officer Lopez drew their weapons. Officer Agasyan then knocked loudly on the trailer, announcing several times "Police Department, State Parole."

Ms. Rosen looked out and saw the officers with vests that said "Police." She told defendant, who was sitting on the bed, that it was the police knocking on the trailer. He told her, "Don't

f-----g let them in here." Ms. Rosen thought defendant looked scared. He pulled blankets around himself as if trying to hide. Ms. Rosen called out to the officers that she wanted to put on a shirt before stepping out. Both Officer Lopez and Officer Agasyan thought it was taking too long, so they knocked and announced themselves again. Ms. Rosen finally came outside. Officer Lopez thought it looked like she was trying to distance herself from the trailer. They showed her a photograph of defendant and asked her if he was inside. She said no. According to Ms. Rosen, she only shrugged her shoulders when asked if defendant was inside. Ms. Rosen also denied there were any weapons inside, except for a butcher knife. Officer Lopez said Ms. Rosen gave them permission to enter the trailer.

Officers Lopez and Agasyan stepped inside the trailer with their weapons drawn and announced their presence again. There were clutter and debris throughout the trailer, including a mattress layered with clothing and blankets. Officer Agasyan saw the silhouette of a person lying on his or her side under an afghan-type blanket; a knee was protruding from underneath the blanket. When Officer Lopez reached down to tap the person, the person moved. Officer Lopez immediately yelled for the person to show their hands. Almost simultaneously, Officer Lopez heard a gunshot. Officer Agasyan saw what appeared to be fibers from the blanket in the air around them, illuminated by sunlight. He also saw that Officer Lopez was bleeding from his face. Officer Agasyan fired several shots in the direction of the person under the blanket. Another shot came from under the blanket and just missed hitting Officer Agasyan's forehead. Officer Lopez ran from the trailer, as did Officer Agasyan, after firing several more shots toward the mattress.

Defendant was able to get out of the trailer despite his injuries. He apparently passed out near the edge of the property bordering the freeway. With the assistance of a canine unit, defendant was found and arrested. Ms. Rosen was also arrested.[1]

Officer Lopez suffered a gunshot wound to his jaw that required reconstructive surgery. The injuries he sustained ended his law enforcement career.

Defendant testified in his own defense and admitted he was a fugitive parolee in January 2012 when the shooting occurred. He denied knowing that Lopez and Agasyan were peace officers and denied that he had been hiding under the blankets. He said that he had been asleep in the trailer, when he was awakened by individuals dressed in black tapping him on the head with a gun. Defendant recalled only hearing the words, "get up, we gotcha." He did not hear the officers identify themselves. He had no idea who the officers were. He was afraid and fired at them in self-defense. He said he could not recall who fired first because everything happened very quickly, but both officers fired their guns and he suffered three gunshot wounds to his legs, as well as two grazing wounds to his arms.

Defendant also admitted he was a felon, conceding he had two prior convictions for being a felon in possession of a firearm, as well as convictions for making criminal threats, attempted burglary and escaping a custodial institution. He also admitted he did not want to return to prison, but that he had been

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[1] Ms. Rosen was originally charged with two counts of attempted murder, but reached a plea agreement to plead to two counts of assault with a deadly weapon in exchange for a three-year sentence. She had completed her sentence by the time of her trial testimony.

planning on voluntarily surrendering to authorities after the holidays.

On the morning of July 20, 2015, the jury returned its verdict, finding defendant guilty of the attempted premeditated murders of Officer Lopez and Officer Agasyan and of being a felon in possession of a firearm. The jury also found true the allegations that defendant personally and intentionally discharged a firearm and caused great bodily injury to Officer Lopez. As to Officer Agasyan, the jury found true that defendant had personally and intentionally discharged a firearm in the commission of the offense.

Later that afternoon, in a bifurcated proceeding, the court found true the allegation that defendant had suffered two prior convictions for serious or violent felonies (robbery and criminal threats), and had suffered two prison priors (criminal threats and attempted burglary).

After the court made its findings on the priors, defendant told the court he wanted to make a *Faretta* motion and be returned to in propria persona status. Defendant also requested a complete set of transcripts for the four-week trial and a 90- to 120-day continuance of his sentencing hearing so that he could have time to file a motion for a new trial. The court denied the motion. We reserve a more detailed discussion of the relevant facts to part 3 of the Discussion below.

The court scheduled sentencing for September 9, 2015, and stated that any posttrial motions would be heard the same day.

At the beginning of the September 9 hearing, defendant advised the court he wished to make a *Marsden* motion. Defendant requested substitute counsel or, alternatively, to be returned to propria persona status. The court denied the motion.

We reserve a more detailed discussion of the relevant facts to part 3 of the Discussion below.

The court proceeded with sentencing. Defense counsel made an oral motion pursuant to *People v. Superior Court (Romero*) (1996) 13 Cal.4th 497. The court denied the motion, explaining that defendant's criminal history has continued "relatively unabated" from 1985 to the present. However, the court did strike one of defendant's prison priors.

The court sentenced defendant to an aggregate state prison term of 140 years to life, plus 53 years, calculated as follows: a term of 45 years to life on count 1 (third strike sentence for attempted murder of Officer Lopez), plus a consecutive term of 25 years to life for the firearm allegation (Pen. Code, § 12022.53, subd. (d)), plus two consecutive five-year terms for the strike priors (§ 667, subd. (a)(1)), and a one-year prison prior (§ 667.5); a consecutive term of 45 years to life on count 2 (third strike sentence for attempted murder of Office Agasyan), plus a consecutive 20-year term for the firearm allegation (§ 12022.53, subd. (c)), plus two consecutive five-year terms for the strike priors (§ 667, subd. (a)(1)), and a one-year prison prior (§ 667.5); and, a consecutive term of 25 years to life on count 3 (third strike sentence on possession), plus two consecutive five-year terms for the strike priors (§ 667, subd. (a)(1)), and a one-year prison prior (§ 667.5). Defendant was awarded 1,546 days of presentence custody credits. The court also ordered victim restitution and imposed various fees not at issue in this appeal.

This appeal followed.

DISCUSSION

1. CALCRIM No. 375

Defendant claims instructional error in the giving of CALCRIM No. 375. Our review is de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218 [appellate court independently reviews whether an instruction correctly states the applicable law and whether it "effectively direct[s] a finding adverse to a defendant by removing an issue from the jury's consideration"].)

During pretrial proceedings, defendant argued he was not contesting that he was a fugitive parolee in the fall of 2011. He argued however, that the court should exclude evidence of the November 9, 2011 encounter with Deputy Maloney in which he gave a false identity and fled. Defendant argued such evidence was akin to bad character evidence and unduly prejudicial. The court concluded it was more probative than prejudicial.

As described above, Deputy Maloney testified to his encounter with defendant and Ms. Rosen on November 9, 2011. Later, when the court was discussing instructions with counsel, defendant objected to the giving of CALCRIM No. 375. The court concluded the evidence supported the instruction and gave it over defendant's objection. The modified version of CALCRIM No. 375 given to the jury read as follows:

"The People presented evidence of other conduct by the defendant that was not charged in this case, referring to Deputy Shane Maloney's testimony that on November 9th of 2011 the defendant gave a false name and left the scene where Deputy Maloney was detaining Lesa Rosen. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed these uncharged acts. Proof by a preponderance of the evidence is a different

burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged acts, you may but are not required to consider that evidence for the limited purpose of deciding whether or not: [¶] one, the defendant acted with the intent to kill; or, [¶] two, the defendant acted willfully with deliberation and premeditation; or, [¶] three, the defendant had a motive to commit the offenses alleged in this case; or, [¶] four, the defendant's alleged actions were the result of mistake or accident. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged acts, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of the charged offenses and allegations. [¶] The People must prove each charge and allegation beyond a reasonable doubt."

Defendant contends the instruction, in effect, excused the prosecution from having to prove intent to kill and premeditation beyond a reasonable doubt. He argues the instruction failed to include the optional language instructing the jury to consider the similarity, or lack thereof, of the prior bad conduct, and allowed the jury to leap to the conclusion that he premeditated the January 4, 2012 attack on Officers Lopez and Agasyan merely because he gave Deputy Maloney a false name some two months earlier to avoid arrest as a fugitive parolee.

Defendant's argument is without merit. CALCRIM No. 375 contained language plainly informing the jurors that if they concluded defendant committed the uncharged conduct, it was but "one factor" to consider, and that it was not sufficient by itself to prove defendant guilty of any of the charged offenses. The instruction concluded with language reminding the jurors that the prosecution must prove each charge and allegation beyond a reasonable doubt.

Additional support for the validity of the instruction is found in the other instructions provided to the jury. CALCRIM No. 375 was immediately followed by CALCRIM No. 600 and No. 601 which properly defined the elements of attempted murder, including the requisite intent. Like CALCRIM No. 375, CALCRIM No. 601 underscored the prosecution's burden to establish all of the elements of attempted murder beyond a reasonable doubt. Moreover, CALCRIM No. 220 defined the beyond a reasonable doubt standard. And, in CALCRIM No. 200, the jury was instructed that it was to consider the instructions as a whole.

In resolving defendant's challenge to CALCRIM No. 375, we must consider it " 'in the context of the instructions as a whole and the trial record' to determine ' "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' " (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) With this standard in mind, we find no reasonable jury would have concluded that intent to kill could be established by a preponderance standard or that proof of the uncharged conduct of November 9, 2011, was sufficient in and of itself to find defendant guilty of attempted murder. We find no error in the giving of CALCRIM No. 375.

2. The *Pitchess* and *Brady* Motions

Defendant argues the court erred in denying his pretrial discovery motions pursuant to *Pitchess* and *Brady*. Both motions were brought while defendant was in propria persona. Defendant has failed to show any abuse of discretion by the trial court in ruling on his discovery motions. (*People v. Hughes* (2002) 27 Cal.4th 287, 330 ["A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion."].)

Defendant's initial two filings pursuant to *Pitchess* were denied without prejudice for procedural irregularities. Defendant then filed a third motion. As to that motion, the trial court found good cause for an in camera review of the personnel records of Officers Lopez and Agasyan. The in camera hearing was held on October 4, 2013.

We have reviewed the sealed transcript of the October 4 hearing which demonstrates the trial court thoroughly complied with its obligations. The custodian of records was placed under oath and the proceedings were transcribed by a court reporter. The court ordered the transcript sealed. Moreover, the court made a detailed record of the documents it reviewed and explained the bases for its rulings on discoverability. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229 [trial court may make a proper record by describing the records examined].)

Based on our review of the record, we conclude the trial court did not abuse its discretion in ruling on defendant's motion.

With respect to the denial of defendant's *Brady* motion in December 2013, we also find no abuse of discretion by the trial court. Defendant's request for records related to alleged, unspecified misconduct by Detective Fredendall and was based

on speculation. Mere speculation that something useful might be located in official records "is not sufficient to demonstrate a *Brady* violation." (*People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1214; accord, *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1472.)

Similarly, the request for any psychological records related to Officer Agasyan was patently specious. Officer Agasyan, in describing the January 4 shooting incident, referred to defendant as the "devil himself." From this figure of speech, defendant asserted he was entitled to discover any psychological records of Officer Agasyan to ferret out religious issues or delusions relevant to impeachment. The trial court was well within its discretion in denying the motion in its entirety.[2]

3. The *Faretta* and *Marsden* Motions

Defendant next contends the court erred in denying his postverdict, presentence motions pursuant to *Faretta* and *Marsden*. We disagree.

Defendant focuses primarily on the denial of his *Faretta* requests on July 20, 2015, after the bench trial on the prior allegations, and on September 9, 2015, at the start of the sentencing hearing. Because the requests were made postverdict, defendant argues he had an absolute constitutional right to be granted in propria persona status for purposes of bringing

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[2] Defendant challenged the trial court's denial of his *Brady* motion by writ of mandate. This court denied the writ by order dated February 11, 2015 (B261676). The order was without prejudice to defendant bringing a proper *Pitchess* motion in the trial court as to the desired records. Defendant apparently did not attempt to seek such records in accordance with the *Pitchess* procedure.

posttrial motions and sentencing. Defendant argues that *Faretta* error is reversible per se and that he is entitled to a remand for resentencing.

"Much as a request to represent oneself at trial must be made a reasonable time before trial commences, the request for self-representation at sentencing must be made within a reasonable time prior to commencement of the sentencing hearing." (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024.) "In determining what constitutes a 'reasonable time' before sentencing, a trial court must necessarily consider the delay that would be occasioned by granting the motion." (*People v. Mayfield* (1997) 14 Cal.4th 668, 810, overruled in part on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2 [delay of six months would "compromise the orderly and expeditious administration of justice"].)

In addition to requesting a complete transcript of the four-week trial, defendant requested that sentencing be delayed for at least 90 to 120 days so that he could prepare and file a motion for new trial before sentencing took place.

More importantly, this was *not* defendant's first request to represent himself. The court had indulged his desires multiple times to change back and forth between being represented by appointed counsel and representing himself in propria persona. The court was well within its discretion in taking defendant's actions into consideration in ruling on his renewed request to once again be allowed to proceed in propria persona.

"*Faretta* itself warned that a trial court 'may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.' [Citation.] *We assume the same rule applies to the denial of a motion for self-*

representation in the first instance when a defendant's conduct prior to the Faretta motion gives the trial court a reasonable basis for believing that his self-representation will create disruption. 'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.' " (*People v. Welch* (1999) 20 Cal.4th 701, 734, italics added.)

"When determining whether termination is necessary and appropriate, the trial court should consider several factors in addition to the nature of the misconduct and its impact on the trial proceedings. One consideration is the availability and suitability of alternative sanctions. . . . The court should also consider whether the defendant has been warned that particular misconduct will result in termination of in propria persona status. . . . [¶] Additionally, the trial court may assess whether the defendant has 'intentionally sought to disrupt and delay his trial.' . . . In many instances, such a purpose will suffice to order termination." (*People v. Carson* (2005) 35 Cal.4th 1, 10 (*Carson*), citation omitted.)

Here, the trial court explained in detail the bases for its denial. We therefore quote at length from the court's stated reasons.

"Before you ever came to my court, you were granted your request to represent yourself in Judge Klein's court. [¶] . . . He walked through all of the pro per rules, consequences. You signed it, you acknowledged understanding everything. . . . [¶] When the case came up for preliminary hearing . . . on that very day you asked the court to take away your pro per status and allow standby counsel to represent you . . . . [¶] . . . [¶] . . . When the preliminary hearing concluded and you were held to

answer, you requested that you regain your pro per status, which was granted to you. . . . [¶] . . . When you came to my court . . . from the very beginning I told you that I was suspicious that you might once again give up your pro per status at some point in time. [¶] And as I look back on this case, I saw that we spent months and months and months on basically fruitless discovery issues, the hiring of experts that were testing things that I can't say I've heard of in any case whatsoever, things that are of a conspiratorial nature, things that are requested by someone who shows a real suspicion about just about anything that occurred in this case.

"Along the way, your first standby counsel became ill and I had to find somebody else to stand in, just in case you would do the thing that you told me you were not going to do. And you told me this many times, that you would not give up your pro per status. And Mr. Nardoni came into the case as standby counsel, spent a considerable amount of time to try to get up to speed . . . . [¶] . . . [¶]

"[Y]ou came to my court and promised me that you would not give up your pro per status again and after having you violate numerous jail rules and procedures which caused you to lose your pro per privileges and after you had, by the testimony of [Ms. Rosen], made veiled threats against her during a bus trip to come over to my court . . . you asked me if you could give up your pro per status once again. And that was pretty close to trial. I think it was two weeks or three weeks, maybe it was a month. . . . I had told you a lawyer is going to have a lot of trouble giving a 100-percent representation . . . . And I must have said it five different times over five court proceedings, because my instincts were that you were essentially using your pro per status to run a

discovery process that went on for months and months and months. . . . [¶] . . . [¶] . . . [Y]ou asked me to take away your pro per status, I asked you if you promised me that you would not ask me again to be pro per. And you said, yes, I promise.

"If you think about it—you're laughing right now . . . . And here we are after all of this, facing sentence, asking me for 90 to 120 days and a full set of transcripts to put you back into a pro per setting.

"You have abused the court process by this, and you have disrupted the process in my court by this overall waffling in your self-representation. That's what makes this case very unusual. . . . [¶] And so I'm trying to lay out my reasoning as to why I'm going to deny your pro per [request] a rare case. There's also references to telephone calls that you made from the jail when you were pro per that were disruptive of the process. There were incidents in the jail which I outlined in support of using a stealth belt to keep you in your chair that involved violations of procedures, creating dangers to others, disruption of deputies while you were in jail. You are a difficult defendant in that sense. I'm saying that objectively. And I think that is part of what makes this particular case unusual. [¶] . . . I feel [Mr. Nardoni is] highly, highly qualified to represent you for the balance of this case.

"So your pro per status request is denied. . . . [¶] . . . I haven't gone into all of the details about how you lost your privileges and disruptions during the trial when I cautioned you many times not to be staring at the jury and trying to ingratiate yourself with them, that I had to ask you numerous times in my courtroom, that I had to have more than a few deputies in this courtroom because of the security risk that you represented. . . .

So that decision is that your request for pro per representation is denied at this time."

We must "accord due deference to the trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial in determining whether termination of *Faretta* rights is necessary to maintain the fairness of the proceedings." (*Carson*, *supra*, 35 Cal.4th at p. 12.) With this standard in mind, we have no trouble concluding the court did not abuse its discretion in denying defendant's *Faretta* request. The court set forth ample reasons justifying its refusal to allow defendant to be returned to in propria persona status on the eve of sentencing.

When the parties returned for sentencing on September 9, 2015, defendant made a motion to substitute counsel pursuant to *Marsden*. The court cleared the courtroom and ordered the record of the proceedings sealed. Defendant raised numerous points of dissatisfaction with his trial counsel, including his failure to present expert witnesses, the manner in which he cross-examined the prosecution witnesses, and his failure to file a motion for new trial. Defendant requested that his counsel be relieved and again requested that he be allowed to proceed in propria persona, or alternatively, be appointed a new attorney.

In denying defendant's motion, the court again explained in detail the bases for its denial, noting that defendant's claims against Mr. Nardoni were largely unfounded and not supported by the trial record. The court further said, "As I said back in July, the last time we were in court and you requested to represent yourself again, I did make a record of why I was denying that, because I believed then as I believe now that you've

abused that process. And I'm willing to stand on that. I said that this was an unusual case with the type of pro per that you have been. I'm not going to repeat everything that I said back on July 20th, but I am not going to continue the sentencing hearing. If you want to be heard during the sentencing hearing today . . . then I'll give you an opportunity to be heard."

Defendant has articulated no basis that would justify deviating from the court's ruling on July 20 denying his *Faretta* motion. Those same reasons support the court's denial of the September 9 request.

As for defendant's *Marsden* request of the same date, we also review the court's ruling under the deferential abuse of discretion standard. (*People v. Zendejas* (2016) 247 Cal.App.4th 1098, 1108.) A defendant is entitled to relief under *Marsden* " ' "if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." ' " (*Zendejas,* at p. 1108.) Defendant has made no such showing.

4. Ineffective Assistance of Counsel

Defendant argues his appointed trial counsel (Mr. Nardoni) was ineffective. He cites a myriad of alleged failings related to defense counsel's litigation tactics (failure to call expert witnesses, failure to cross-examine, failure to object), as well as his failure to file a motion of new trial.

It is well established that " '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' "

(*People v. Huggins* (2006) 38 Cal.4th 175, 206.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

To the extent defendant's claimed deficiencies relate to trial strategy by Mr. Nardoni, counsel's tactical trial decisions are accorded substantial deference. (*People v. Hayes* (1990) 52 Cal.3d 577, 621.) Ordinarily, the failure to object to evidence or the manner in which counsel pursues cross-examination of witnesses are matters of trial tactics. " 'A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1185; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 424.)

Further, the record belies several of defendant's claims. Defendant contends his counsel refused to put on any expert witnesses. However, during pretrial discussions of the parties' anticipated witnesses, Mr. Nardoni explained that one of the experts engaged by defendant while in propria persona had not responded to any of his efforts to speak with him. He also explained that another expert contacted by defendant would not be called because he failed to prepare a report and could not even recall the facts of the case when Mr. Nardoni attempted to discuss his testimony with him.

Defendant also faulted Mr. Nardoni for failing to object or seek an instruction regarding testimony by some prosecution witnesses referring to defendant having an extensive criminal history or words to that effect. However, the court did instruct with CALCRIM No. 303 which informed the jury that testimony from certain witnesses who believed defendant was armed and dangerous or had a history of violence was admitted for a limited

purpose. The instruction provided in relevant part: "This evidence is not admitted to prove that the defendant, in fact, engaged in such conduct, but is admitted for the limited purpose of showing how such information, if believed by the witnesses, may or may not have affected the witnesses' conduct and state of mind on January 4, 2012. You may consider that evidence only for that purpose and for no other. Do not consider that testimony as proof that the information contained in the statements is true. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

As for the new trial motion, Mr. Nardoni explained during the *Marsden* proceedings that he had not been able to find any good faith bases for bringing such a motion.

5. The Sentence on Count 3

Finally, defendant contends the court committed sentencing error with respect to count 3 (possession of a firearm by a felon). Defendant argues the court erred in imposing a third strike sentence of 25 years to life because possession of a firearm is not a serious or violent felony, the prosecution failed to plead and prove a disqualifying factor in accordance with the statutory scheme, and therefore a second strike sentence was mandatory. Defendant further argues that count 3 not being an enumerated serious felony also precluded imposition of the two 5-year enhancements pursuant to Penal Code section 667, subdivision (a)(1) and those enhancements must be stricken.[3] We agree.

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[3] In his reply brief, defendant withdrew his argument that the record did not support the court having imposed an 11-year determinate term on count 3.

In 2012, California voters passed the Three Strikes Reform Act of 2012 (Act), commonly known as Proposition 36. (*People v. Conley* (2016) 63 Cal.4th 646, 651 (*Conley*).) Under the revised penalty provisions of the Act, the prescribed sentence for a third strike defendant who suffers a current conviction that is not a serious or violent felony is no longer an indeterminate life sentence. (Pen. Code, § 667, subd. (e)(2)(C), § 1170.12, subd. (c)(2)(C).) Rather, such defendants are treated the same as second strike defendants, receiving a sentence that is equal to " 'twice the term otherwise provided as punishment for the current felony.' " (*Conley,* at p. 653.)

However, the Act also contains four enumerated exceptions that may apply to render a third strike defendant ineligible for this ameliorative change in the "Three Strikes" law. "Section 667(e)(2)(C) provides in pertinent part that, '[i]f a defendant has two or more prior serious and/or violent felony convictions . . . and the current offense is not a serious or violent felony . . . *the defendant shall be sentenced* . . .' (italics added) as a second strike offender 'unless the prosecution *pleads and proves'* (italics added) any of the four enumerated exceptions or exclusions set forth in clauses (i) through (iv) of section 667(e)(2)(C). [Citation.] [¶] Section 1170.12(c)(2)(C) similarly provides that, '[i]f a defendant has two or more prior serious and/or violent felony convictions . . . and the current offense is not a [serious or violent] felony . . . , *the defendant shall be sentenced* . . .' (italics added) as a second strike offender 'unless the prosecution *pleads and proves*' (italics added) any of the four enumerated exceptions or exclusions set forth in clauses (i) through (iv) of section 1170.12(c)(2)(C)." (*People v. White* (2014) 223 Cal.App.4th 512, 526 (*White*).)

Further, "[t]here are two parts to the Act: the first part is *prospective* only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony (Pen. Code, §§ 667, 1170.12); the second part is *retrospective*, providing *similar, but not identical*, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony (Pen. Code, § 1170.126)." (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1292.)

We are here concerned with only the prospective part of the Act, which went into effect before defendant's sentencing hearing. The prospective part of the Act includes an express pleading and proof requirement for any disqualifying factor. (Pen. Code, §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); *Conley*, *supra*, 63 Cal.4th at p. 653 [" 'The Act provides that these disqualifying factors must be pleaded and proved by the prosecution.' "].)

Being armed with a firearm during the commission of the current offense is a disqualifying factor under the Act. (Pen. Code, § 667, subd. (e)(2)(C)(iii), § 1170.12, subd. (c)(2)(C)(iii).) But, in order to seek a third strike sentence on count 3, the prosecution was required to plead and prove that defendant was armed during the possession count. (*White*, *supra*, 223 Cal.App.4th at pp. 526-527; accord, *Conley*, *supra*, 63 Cal.4th at p. 653.)

It is undisputed that the information did not plead a firearm use allegation with respect to count 3. During trial the prosecution did amend count 3, changing it to possession of a firearm by a felon in violation of Penal Code section 29800, from a violation of section 29900 (possession of a firearm with a prior violent conviction) as it had originally been pled. The prosecution

did not request or make any other changes to the information. The firearm use allegations were pled only as to the counts 1 and 2, the two attempted murder counts. The verdict form for count 3 therefore did not contain any finding that defendant was armed during the commission of the possession count.

At sentencing, the trial court reasoned there was evidence defendant had possession of various firearms antecedent to commission of the attempted murders. The court properly relied on such evidence in concluding that Penal Code section 654 did not require a stay of sentence imposed on count 3. However, such evidence does not satisfy the statutory pleading and proof requirement.

The evidence of constructive possession of various firearms by defendant antecedent to the commission of the attempted murders was sufficient to support his guilty verdict on count 3. But, "possession of a firearm does not necessarily require that the possessor be armed with it." (*White*, *supra*, 223 Cal.App.4th at p. 524.) Nor did such evidence satisfy defendant's right to fair notice of the any allegations that that would be invoked by the prosecution to increase his punishment on count 3. (See, e.g., *People v. Tennard* (2017) 18 Cal.App.5th 476, 486-488.)

Respondent relies on *White* to argue to the contrary. However, *White* involved a resentencing petition and the retrospective part of the Act. The retrospective part of the Act does *not* include the same pleading and proof requirements as the prospective part. (*White*, *supra*, 223 Cal.App.4th at pp. 526-527.)

Accordingly, the imposition of a third strike sentence on count 3 was not statutorily authorized. A second strike sentence was mandatory. As such, we reverse the 25-to-life sentence imposed on count 3.

In addition, because count 3, possession of a firearm by a felon, is not a serious felony, it was error to impose the two 5-year enhancements pursuant to Penal Code section 667, subdivision (a)(1). (*People v. Briceno* (2004) 34 Cal.4th 451, 458; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1563.) Those two enhancements must therefore be stricken from the sentence on count 3.

At resentencing, the superior court is directed to exercise its discretion to impose an appropriate sentence in accordance with Penal Code section 18. The term selected by the court shall be doubled in accordance with Penal Code section 667, subdivision (e)(1) and section 1170.12, subdivision (c)(1).

DISPOSITION

The sentence on count 3 is reversed.

The judgment of conviction is affirmed in all other respects. The action is remanded to the superior court for a new sentencing hearing in accordance with this opinion. After resentencing, the superior court is directed to prepare and forward a modified abstract of judgment to the Department of Corrections and Rehabilitation.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

WILEY, J.